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No. 91-1946

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OKLAHOMA ex rel.
DEPARTMENT OF HUMAN SERVICES,

Petitioner,

v.

TRUST COMPANY OF OKLAHOMA, guardian
of the estate of Ellen Lee Barker,
a minor child,

Respondent.

BRIEF IN OPPOSITION

TO PETITION FOR CERTIORARI

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child

QUESTIONS PRESENTED FOR REVIEW

1. Whether a trust, created for the primary purpose of providing non-medical support but allowing for the payment of medical care if the beneficiary became ineligible for medical assistance, is an "available resource" under the Medicaid Act, 42 U.S.C. §1396a(a)(17)(B).

2. Whether the grantor of a trust may specifically exclude assets of a trust from consideration by a state as a "resource" under the Medicaid Act, 42 U.S.C. §1396a (a)(17)(B) and whether state law controls the definition of "resources" under the Medicaid Act.

3. Whether the Petitioner timely raised Supremacy Clause issue during the state court appellate process as required by Oklahoma Rule 1.16 of Rules of Appellate Procedure in Civil Case.

4. Whether the application of the Oklahoma Supreme Court's state procedural waiver rule improperly precluded the application of federal law in considering the income from a state-created trust in the determination of Medicaid eligibility under 42 U.S.C §1396a(a)(17)(B).

5. Whether an inter vivos trust agreement between a tortfeasor and the guardian of the estate of a minor child constitutes a "Medicaid Qualifying Trust" under the terms of Medicaid Act, 42 U.S.C. §1396a(k)(2).

6. Whether the actions of the Petitioner estopped it from asserting the Trust was an "available resource."

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion set forth in the Petition for Writ of Certiorari is accurate.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Jurisdiction would be invoked as set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner's Appendix II cites Oklahoma Department of Human Services hereinafter referred to as "DHS") Regulation 1062.9 - 1063.211. The text of the Appendix actually includes Regulation 1063.212. For the purpose of explaining this scrivener's error, Respondent's Appendix I sets forth the text of Regulation 1063.212. In addition Appendix I contains Oklahoma Department of Human Services Regulation 1022.23. Appendix II is Oklahoma Rule 1.16 of the Rules of Appellate Procedure in Civil Cases.

STATEMENT OF CASE

Ellen Barker was four years old when she was injured in a vehicle accident in Arizona on September 20, 1980. The car in which she was riding collided with a school bus operated by Gando Public School District

No. 19, Apache County, Arizona ("Apache School District") and as a result she was rendered a quadriplegic. At the time of her injury she was eligible and therefore was provided medical assistance by DHS.

Within the first six months following her injury, DHS provided $160,000.00 in medical assistance to Ellen Barker. DHS was aware that she was pursuing a claim for her personal injuries and Herbert Hyde, its attorney, filed a lien in Apache County, Arizona, the county where the collision occurred.

Ellen Barker's Arizona attorney wanted to settle her personal injury claim for a sum that would provide for Ellen Barker's medical as well as other needs for the remainder of her life, but such settlement would have been $5,000,000.00 to $7,000,000.00. Such sum was not offered to settle the claim and the Apache School

District would have pursued the case through a trial. Ellen Barker's attorney told Mr. Hyde that the Arizona judge who would be assigned the case would not approve the settlement if the amount was not adequate to pay Ellen Barker's past and future medical expense her permanent disability, pain and all other damages Ellen Barker had sustained. If the case were to be settled, all parties, including DHS, would have to compromise.

Mr. Hyde discussed this case with Lloyd Rader, the then Director of DHS, and it was decided that DHS would accept $200,000.00 as full settlement of Ellen Barker's medical damages. The balance of the settlement would be placed in a discretionary trust for Ellen Barker's non-medical damages.

DHS's acceptance of $200,000.00 formed a basis for the settlement of her claims against the Apache School District. The

Arizona judge approved the settlement, authorized the disbursement of attorney's fees and payment to DHS of $200,000.00. The remaining $818,940.00 was paid to Trust Company of Oklahoma (hereinafter referred to as "Trust Company") to be held pursuant to the Trust Agreement reviewed and approved by the Arizona Judge. Apache School District was the settlor of the trust. Both the purpose clause and powers clause contained in the Trust Agreement make it clear the funds are to be used for Ellen Barker's non-medical needs. Trust Company was also appointed guardian of the estate of Ellen Barker. The guardianship and Trust Agreement were also approved by the District Court of Oklahoma County, State of Oklahoma.

It is not only clear in the Trust Agreement but in the Order Approving Settlement, that it was contemplated by the settlor that the trust funds would be used

solely at the discretion of the trustee for Ellen Barker's non-medical needs. Ellen Barker cannot compel the trustee to distribute funds to her.

An applicant for medical assistance under both Title XIX and CCP regulations is denied eligibility if the applicant has an "available resource" for payment of the applicant's own medical expense. From May of 1981 until June 30, 1987, DHS recertified Ellen every six months and the trust was not treated as an available resource. In 1987, DHS reversed its position and denied future medical assistance to Ellen Barker.

Trust Company appealed the decision through the DHS administrative process but the decision to terminate the assistance was sustained. Trust Company then appealed to the state district court (hereinafter referred to as "trial court") which reversed the decision of DHS. DHS then appealed to

the Oklahoma Supreme Court by filing its petition in error, a copy of which is Appendix III.

The Supreme Court of Oklahoma assigned the case to one of the Oklahoma Court of Appeals which reversed the trial court. Trust Company petitioned for rehearing but that was denied. Trust Company then filed its petition for certiorari with the Supreme Court of Oklahoma which granted the petition, reversed the Court of Appeals and affirmed the trial court. DHS petitioned the Oklahoma Supreme Court for rehearing which was denied. It was at this stage DHS first raised the Supremacy Clause argument.

SUMMARY OF ARGUMENT FOR DENYING THE WRIT

The Oklahoma Supreme Court was not presented a constitutional issue and hence this court should decline certiorari.

Whether a trust is an available resource depends upon a case by case analysis. A decision by this court will not further a uniformity of law but will only determine this issue for this isolated case. The state court below has reached a fair decision based upon the facts and such decision should not be further reviewed.

A. THE PETITIONER DID NOT TIMELY RAISE THE FEDERAL CONSTITUTIONAL CLAIM IN THE COURT BELOW.

In Oklahoma, an appeal from a trial court is perfected by filing a petition in error pursuant to Rule 1.16 of Rules of Appellate Procedure in Civil Cases. The precise points of law to be urged as error must be set forth in the petition in error. Error that is argued in a brief but not set forth in the petition in error will not be considered on appeal. Barber v. Flynn, 628 P.2d 1151 (Okl., 1980).

The Petitioner commenced the original appeal by filing its Petition in Error which is set forth in the Appendix III to this Brief. The errors raised do not complain that the Supremacy Clause of the United States Constitution was violated. As Petitioner points out in its Appendix III, this case was initially decided by the Court of Appeals in favor of Petitioner. Trust Company petitioned the Supreme Court of Oklahoma for certiorari. Before certiorari was granted, Petitioner filed its response without raising the Supremacy Clause issue. Once certiorari had been accepted, the Court of Appeals decision reversed and the trial court's decision reinstated, the Petitioner filed its Petitioner for Rehearing. It was at this stage that the Supremacy Clause of the United States Constitution was raised. Without written opinion, the Supreme Court of Oklahoma denied the Petition for

Rehearing. This Court should decline to rule on federal constitutional claims not properly perfected and decided by the Supreme Court of Oklahoma. Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct 1645, 100 L.Ed.2d 62 (1988).

B. ANY VARIATION IN INTERPRETATION OF THE FEDERAL STATUTE WHICH RELATES TO WHETHER A TRUST IS AN AVAILABLE RESOURCE HAS OCCURRED BECAUSE EACH CASE VARIES AS TO FACTS.

The Petitioner argues that this court should accept certiorari and decide once and for all whether a trust is an available resource under 42 U.S.C. §1396a(a)(17)(B). One must presume this means one rule for all trusts and not decisions on a case-by-case basis. This is not practical because of the wide variation in the factual situations. Perhaps the Secretary foresaw this problem and hence the reason for a general and not a specific definition.

A review of the cases illustrate divergent facts presented to court across the country. In Barham by Barham v. Rubin, 816 P.2d 965 (Hawaii 1991) a tort claim was settled for $310,000 in cash and an annuity of $3,000 a month for life. A Colorado probate court, as settlor, created a trust for Phillip W. Barham. The court held this to be a "medicaid qualifying trust" (MQT) under 42 U.S.C. 1396a(k)(2) which rendered him ineligible for public assistance.

In some states damages awarded a minor in a tort claim must be placed in a restricted bank account which may only be withdrawn with a court order. Arkansas Department of Human Services v. Donis, 280 Ark. 169, 655 S.W.2d 452 (Ark. 1983) and In the Matter of Welfare of K. S., 427 N.W.2d 653 (Minn. 1988) have both held such bank accounts to be available resources.

Other cases have dealt with testamentary trusts. Lang v. Commonwealth, Department of Welfare, 515 Pa. 428, 528 A.2d 1335 (Pa. 1987), Hoelzer v. Blum, 462 N.Y.S.2d 684, 93 A.D.2d 605 (N.Y.App.Div. 1983), Chenot v. Bordeleau, 561 A.2d 891 (R.I. 1989), Lineback v. Stout, 79 N.C.App. 292, 339 S.E.2d 103 (1986), Tidrow v. Director, 688 S.W.2d 9 (Mo.Ct.App. 1985). Each of these trusts had its own unique wording which each court interpreted in making its decision that the trust was not an available resource. In Miller v. Ibarra, 746 F.Supp. 19 (D.Colo.1990), the court held that trusts created by the district court for severely disabled persons were not available resources. The settlor was not the beneficiary of the trust.

The variation in the facts in each case is the reason for the differences in decisions. If this Court accepts certiorari

and affirms or reverses the Oklahoma Supreme Court it will not settle this issue once and for all. The Petitioner believes that this Court can unify these decisions thus creating a single rule which will apply to all trusts. This is not a workable solution to an issue which requires flexibility. Accepting certiorari will not serve the purpose which Petitioner desires but will only decide the application of 42 U.S.C. §1396 to this particular fact situation.

C. IF THE SUPREMACY CLAUSE WAS TIMELY RAISED IN THE COURT BELOW, THEN THERE IS NOT CONFLICT BETWEEN STATE TRUST LAW AND THE FEDERAL STATUTE.

The Petitioner argues there is a conflict between 42 U.S.C. §1396a(a)(17)(B) and the Oklahoma Trust law defined by the court below. Since the federal statute only generally provides for taking into account ". . . income and resources as determined in

accordance with the standards prescribed by the Secretary, available to the applicant or recipient. . ." and the state plan does not define this trust as an available resource, the Petitioner can only argue what Congress must have meant in adopting the federal statute. The other argument is that Congress expressed its intent that the Barker trust was an available resource when it adopted the Medicaid Qualifying Trust legislation. It seems obvious the intent of that legislation was to prevent healthy persons with assets from creating their own trust to allow them eligibility for medical benefits.

State rules should not be overridden by federal courts unless there is "clear and substantial" federal interest being damaged. United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed. 404 (1966). There is no clear, direct conflict between federal

statutes and the Oklahoma Supreme Court ruling, only a conflict with the perceived intent of the legislation. The Supremacy Clause is not applicable here.

D. THE PETITIONER'S ACTIONS SHOULD ESTOP IT FROM ASSERTING THE TRUST IS AN AVAILABLE RESOURCE.

The Petitioner was an active participant in the settlement of Ellen Barker's tort claim. A DHS attorney signed a court order approving the Trust Agreement and disbursing $200,000 to it for medical expenses. Ellen Barker continued to receive medical assistance from DHS until June 30, 1987, when it decided that the trust was an available resource.

The trial court found that the actions of DHS estopped it from claiming the trust to be an available resource. The Oklahoma Court of Appeals reversed the trial court on the issue of estoppel without deciding the

available resource question. The Supreme Court of Oklahoma made mention of the estoppel question, but declined to rule because it found that the trust was not an available resource.

Although the general rule is that estoppel does not apply against the government, the Supreme Court of Oklahoma has made an exception where a prevailing public interest exists. Burdick v. Independent School District No. 52, 702 P.2d 48 (Okl. 1985).

It is unfair that Ellen Barker relied upon DHS in settling her tort claim only to find out later that it is reversing its position. The harm cannot be reversed. Estoppel should apply.

CONCLUSION

This case presents no constitutional question for review. The only issue is

whether the state court ruling violates the perceived intent of a federal statute. The Petitioner asks this Court to accept certiorari and establish a rule that will be applicable to all trusts. This is not a practical solution. Perhaps the Secretary has not attempted to further define which trusts are available resources because of the difficulty in predicting the facts of future cases. The Petitioner admits in its brief that there are few applicants for benefits who are beneficiaries of trusts. This is not an important issue for this Court to decide. Certiorari should be denied so that the determination of whether a trust is an available resource will remain flexible and decided on a case by case basis.

Respectfully submitted,

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